TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1921

No. [redacted]187

MARY LOUISE GREINER, EXECUTRIX UNDER THE LAST WILL AND TESTAMENT OF KATE B. KINGSLEY, DECEASED, PLAINTIFF IN ERROR,

vs.

C. G. LEWELLYN, COLLECTOR OF INTERNAL REVENUE.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

FILED [redacted], 1922.

(26,011)

(28,011)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 654.

MARY LOUISE GREINER, EXECUTRIX UNDER THE LAST WILL AND TESTAMENT OF KATE B. KINGSLEY, DECEASED, PLAINTIFF IN ERROR,

vs.

C. G. LEWELLYN, COLLECTOR OF INTERNAL REVENUE.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 27, 1920.

1 In the District Court of the United States for the Western District of Pennsylvania, November Term, 1919.

No. 2200.

MARY LOUISE GREINER, Executrix under the Last Will and Testament of Kate B. Kingsley, Deceased,

vs.

C. G. LEWELLYN, Collector of Internal Revenue for the Twenty-third District.

Among the rolls, records and judicial proceedings had in the District Court of the United States in and for the Western District of Pennsylvania, at No. 2200, November Term, 1919, at law, may be found the following words and figures, to-wit:

Docket Entries.

May 8, 1919.	Præcipe for summons filed.
" " "	Summons in assumpsit returnable to 1st Monday of June next issued.
" 16, "	Writ returnable served on C. G. Lewellyn, Collector of Internal Revenue by handing to and leaving a true and attested copy thereof with C. G. Lewellyn, Collector of Internal Revenue, at Pittsburgh, Pa., May 15, 1919.
July 8, "	Stipulation of parties on facts filed.
" " "	Stipulation waiving Jury Trial filed.
" " "	Præcipe for issue and trial list filed.
Jan. 19, 1920.	Continued.
Feb. 17, "	Amended Stipulation of facts filed.
" " "	Case heard without a Jury and argued C. A. V.
Aug. 27, "	Opinion filed and entered.
" " "	Order entered on Argument List "And now August 27, 1920, the Court finds for the Plaintiff and directs judgment to be entered in favor of the Plaintiff and against the Defendant in the sum of $2,817.69 with interest from March 26, 1919. Per Curiam."
Aug. 27, 1920.	Pursuant to order of court, judgment is hereby entered in favor of the plaintiff and against the defendant, C. G. Lewellyn, Collector of Internal Revenue for the 23rd District of Pennsylvania in the sum of Two thousand eight hundred and seventeen and 69/100 dollars ($2,817.69) with
2	interest from March 26, 1919. J. Wood Clark, Clerk.

Sept. 7, 1920.	Exception to order of court of August 27, 1920, noted on argument list as follows: "And now, September 7, 1920, counsel excepts to the aforesaid finding and order and at his instance exception noted and bill sealed. Charles P. Orr, U. S. District Judge."
Sept. 8, 1920.	Plaintiff's exceptions signed, sealed, and allowed by the court.
Oct. 23, 1920.	Order extending time for filing bill of exceptions filed and entered.
Nov. 9, 1920.	Petition and order granting Writ of error to Supreme Court of the United States filed and entered.
" " "	Assignment of errors filed.
" " "	Bond sur record on writ of error filed.
" " "	Bill of exceptions signed, sealed and filed.
" 18, "	Stipulation sur record on writ of error filed.
" 19, "	Citation awarded, issued, and service accepted by D. J. Driscoll.
" " "	Writ of error issued and copy lodged in Clerk's office.

3 In the District Court of the United States for the Western District of Pennsylvania, November Term, 1919.

No. 2200.

MARY LOUISE GREINER, Executrix Under the Last Will and Testament of Kate B. Kingsley, Deceased.

vs.

C. G. LEWELLYN, Collector of Internal Revenue for the Twenty-third District.

Stipulation of Parties on Facts.

The parties to the above entitled case, by their respective counsel, hereby agree that the facts therein shall be found by the Court as they are hereinafter set forth. Plaintiff and defendant, by their respective counsel, expressly reserve the right of appeal from the decision of the Court.

I.

Plaintiff above named is executrix under the last will and testament of Kate B. Kingsley, deceased, said will being of record in the Recorder's Office of Allegheny County, Pennsylvania, in Will Book, Vol. 145, page 587.

II.

Defendant above named is the Collector of Internal Revenue for the Twenty-third District of Pennsylvania, being duly commissioned as such pursuant to the laws of the United States of America.

III.

Plaintiff, pursuant to the provisions of the Act of Congress of September 8, 1916, as amended, and pursuant to instructions from the Commissioner of Internal Revenue, filed here return
4 as executrix of the Estate of Kate B. Kingsley, deceased, on Internal Revenue Department Form 706.

IV.

At the time of making said return, plaintiff, by her counsel, protested against the inclusion in said return of the value of the bonds of the political sub-divisions of the State of Pennsylvania, belonging to the Estate of Kat- B. Kingsley, deceased, and the item of the amount paid by plaintiff for the collateral inheritance tax of Pennsylvania, asserting the non-liability of said items to taxation under the Estate Tax sections of the Act of Congress of September 8, 1916, and its amendments.

V.

Notwithstanding said plaintiff's protest, the defendant, pursuant to instructions from the Commissioner of Internal Revenue, assessed the plaintiff for the purposes of the Estate Tax the amount of $40,417.34, said amount including the percentage of the portion of the Estate, equal to the value of the portion of the estate invested in the bonds and equal to the value of the portion of the estate paid out for collateral inheritance tax mentioned above in paragraph IV.

VI.

On demand of the defendant, and to avoid the payment of interest and penalties, on March 26, 1919, plaintiff paid the amount of tax assessed, to-wit, $40,417.34, protesting, however, the said assessment and payment, as will appear from Exhibit "A" hereto attached and made a part hereof.

5 VII.

On March 29, 1919, plaintiff duly filed with the defendant a petition for the refund of the amount which plaintiff asserted was illegally exacted from her, as will appear from Exhibit "B" hereto attached and made a part hereof.

VIII.

On April 7, 1919, plaintiff was duly notified by the Commissioner of Internal Revenue that her petition for refund mentioned above in Paragraph VII had been refused, as will appear from Exhibit "C" hereto attached and made a part hereof.

IX.

The portion of the estate tax assessed and collected by defendant from plaintiff pursuant to Section 201 of the Estate Tax Act on the transfer of the portion of the estate of plaintiff's decedent invested in the bonds of political subdivisions of the State of Pennsylvania is $9,117.25.

X.

The portion of the estate tax assessed and collected by defendant from plaintiff pursuant to Section 201 of the Estate Tax Act on the transfer of the portion of the estate of plaintiff's decedent paid out for collateral inheritance tax in Pennsylvania is $2,817.69.

XI.

Plaintiff claims interest from March 26, 1919.

W. D. STEWART,
Attorney for Plaintiff.
B. B. McGINNISS,
Attorney for Defendant.

6 EXHIBIT "A."

Pittsburgh, Pa., March 25, 1919.

Mr. C. G. Llewellyn,
Internal Revenue Collector,
Pittsburgh, Pa.

DEAR SIR:

In re Estate of Kate B. Kingsley.

On behalf of Mary Louise Greiner, executrix of the above entitled estate, I beg to hand you herewith check of Mary Louise Grenier to your order in the sum of $40,417.34 in payment of the estate tax which is shown to be due on Form 706 which has been heretofore filed.

If you will refer to your file you will undoubtedly find a letter from me protesting against the inclusion in Form 706 of certain items upon which it is respectfully asserted no tax is due, and that of the amount which is now being paid $11,935.54 is being exacted illegally.

I beg to therefore advise you, on behalf of Mary Louise Greiner, executrix, that this payment is made under protest and that the proper steps will be taken in accordance with the regulations of the Treasury Department to recover the amount illegally exacted.

Specifically the grounds of objection to the assessment and collection of the estate tax are as follows:

1. So much of the value of the estate as is invested in the bonds of political subdivisions of the state of Pennsylvania is not subject to taxation by the Federal Government, either directly or indirectly, and the Estate Tax is an indirect tax, this amount being $91,178.50.

2. So much of the value of the estate as has been paid in payment of the Collateral Inheritance Tax of the State of Pennsylvania, the amount being $28,176.88, is not taxable under the Estate Tax because:

(*a*) There is no transfer of this amount within the meaning of Section 201.

(*b*) It is no part of the gross estate as defined by Section 202 (*a*).

(*c*) It is properly a deduction under Section 203, being—

(1) An administration expense;

(2) A charge against the estate allowed by the court administering the decedent's estate.

(*d*) An assessment of the tax on this amount violates the Fifth Amendment of the Constitution of the United States.

(*e*) An assessment of the tax on this amount is against justice and equity.

Yours very truly,
[Signed] W. D. STEWART.

EXHIBIT B.

Treasury Department.
Bureau Internal Revenue.
Form 46—Revised Jan., 1920.
Ed. 200,000.

Date of filing to be plainly stamped here

Claim for Refund.

Taxes Erroneously or Illegally Collected.

Also Amounts Paid for Stamps used in Error or Excess.

Important.—This claim should be forwarded to the Collector of Internal Revenue to whom the Tax was paid and must be accompanied by Collector's Receipt therefor.

STATE OF PENNSYLVANIA,
County of Allegheny, ss:

(Write Name so it can be easily read.) Mary Louise Greiner, Ex-
(Name of claimant.)
ecutrix of Kate B. Kingsley, 322 Aiken Avenue, Pittsburgh, Penn-
(Address of claimant: give street and number as well as city
sylvania.
or town, and State.)

This deponent being duly sworn according to law deposes and says that this claim is made on behalf of the claimant named above, and that the facts stated below with reference to the claim are true and complete:

1. Business engaged in by claimant Executrix Estate Kate B. Kingsley.

2. Character of assessment or tax Estate tax.
(State for or upon what the tax was assessed or the stamps affixed.)

3. Amount of assessment or stamps $40,417.34.

4. Amount now asked to be refunded (or such greater amount as is legally refundable) $11,935.54.

5. Date of payment of assessment or purchase of stamps March 26, 1919.

Deponent verily believes that the amount stated in Item 4 should be refunded and claimant now asks and demands refund of said amount for the following reasons:

1. So much of the value of the estate as is invested in the bonds of political subdivisions of the state of Pennsylvania is not subject to taxation by the Federal Government, either directly or indirectly and the Estate Tax is an indirect tax, the amount being $91,178.50.

2. So much of the value of the estate as has been paid in payment of the Collateral Inheritance Tax of the State of Pennsylvania, the amount being $28,176.88, is not taxable under the Estate Tax because:

(*a*) There is no transfer of this amount within the meaning of Section 201.

(*b*) It is no part of the gross estate as defined by Section 202 (*a*).

(*c*) It is properly a deduction under Section 203 being,

(1) An administration expense.

(2) A charge against the estate allowed by the Court administering the decedent's estate.

(*d*) An assessment of the tax on this amount violates the Fifth Amendment to the Constitution of the United States.

(*e*) An assessment of the tax on this amount is against justice and equity.

And this deponent further alleges that the said claimant is not indebted to the United States in any amount whatever, and that no claim has heretofore been presented, except as stated herein, for the refunding of the whole or any part of the amount stated in Item 3.

(Write Name so it can be easily read.)

(Signed) MARY LOUISE GREINER,
Executrix Estate of Kate B. Kingsley.

Sworn to and subscribed before me this 27th day of March, 1919.

C. D. SIEGLE,
(Name.)
Notary Public.
(Title.)

(This affidavit may be sworn to before a Deputy Collector of Internal Revenue without charge.)

8 EXHIBIT "C."

Treasury Department, Washington.

Office of Commissioner of Internal Revenue.

April 7, 1919.

Address Reply to Commissioner of Internal Revenue and Refer to ET—Cl. R.—MR.

Estate of Kate B. Kingsley, 23rd District of Pennsylvania.

Mary Louise Greiner,
Executrix Estate of Kate B. Kingsley,
322 Aiken Avenue, Pittsburgh, Pa.

MADAM:

The Bureau has considered the claim filed by you as executrix of the estate of Kate B. Kingsley for refund of $11,935.54, tax paid upon the estate under the Act of September 8, 1916, as amended by the Act of October 3, 1917.

The claim arises in connection with the tax paid upon the filing of the final return for the estate and is based upon the contention (1) that the value of bonds of political subdivisions of the state of Pennsylvania was improperly included in the gross estate of the decedent, and (2) that an item of $28,176.88, representing the collateral inheritance tax paid to the state of Pennsylvania was improperly disallowed as a deduction from the gross estate.

With reference to item 1, this matter has heretofore been before the Bureau for consideration and it was concluded that municipal securities owned by a decedent are not to be excluded from his gross estate for the purpose of estate tax.

With reference to item 2, this question has also had previous consideration and is governed by Treasury Decision 2524, dated September 10, 1917, which specifically holds that taxes of this character are not "such other charges against the estate as are allowed by the laws of the jurisdiction" within the meaning of the Estate Tax law and that they are accordingly not deductible in arriving at the Federal estate tax.

You are informed therefore, in view of the foregoing, that your claim for refund of $11,935.54, collected under the Estate Tax law, is hereby rejected. The receipt on Form No. 1 which accompanied your claim is returned herewith.

Respectfully,
(Signed) DANIEL C. ROPER,
Commissioner.

H. P.

Enclosure.

9 [Endorsed:] No. 2200, Nov. Term, 1919. U. S. Dist. Court, West. Dist. of Penna. Mary Louise Greiner, Executrix under the Last Will and Testament of Kate B. Kingsley, Deceased, vs. C. G. Lewellyn, Collector of Internal Revenue for the 23rd District. Amended Stipulation of Parties on Facts.

10 In the District Court of the United States for the Western District of Pennsylvania, November Term, 1919.

No.

MARY LOUISE GREINER, Executrix under the Last Will and Testament of Kate B. Kingsley, Deceased.

vs.

C. G. LEWELLYN, Collector of Internal Revenue for the Twenty-third District.

Stipulation Waiving a Jury Trial.

And now, to-wit, July 8th, 1919, we the parties to the above entitled case, by our attorneys, hereby waive the trial by the jury of this cause, and agree that the issues involved in said cause be tried and determined by the Court without the intervention of a jury; however, reserving to us and each of us the right to procure a review of the decision of the Court herein by an appeal or writ of error.

(S.) W. D. STEWART,
Attorney for Plaintiff.

(S.) B. B. McGINNIS,
Attorney for Defendant.

11 In the District Court of the United States for the Western District of Pennsylvania, November Term, 1919.

No. 2200.

MARY LOUISE GREINER, Executrix under the Last Will and Testament of Kate B. Kingsley, Deceased,

vs.

C. G. LEWELLYN, Collector of Internal Revenue for the Twenty-third District.

Opinion.

This is an action brought by the plaintiff to recover taxes which she claims to have been illegally assessed and collected. The parties, by writing filed, have waived trial by jury and have agreed that the issues involved be tried and determined by the Court with a reservation of the right of review, etc. The parties have also agreed upon the facts and their agreement may be summarized as follows:—

The plaintiff, pursuant to the provisions of Title II of the Act of Congress passed September 8th, 1916, 39 Statutes 756-777 and amendments thereto, said Title II being further entitled "Estate Tax"; and pursuant to instructions from the Commissioner of Internal Revenue, filed her return as Executrix aforesaid, on Internal Revenue Department form 706. At the time of making said return, plaintiff protested against the inclusion in said return, of the value of the bonds of political subdivisions of the State of Pennsylvania, which belonged to the estate in her hands, and also the inclusion therein of the amount paid by plaintiff for the collateral inheritance tax imposed by the law of Pennsylvania, asserting the non-liability of said items under said Act and its amendments. Notwithstanding the plaintiff's protest, the defendant, according to instruc-

12 tions from the Commissioner aforesaid, assessed the plaintiff for the purposes of said estate tax, $40,417.34, which amount included the percentage upon that portion of the estate embracing the value of such bonds, and as well the value of the part of the estate paid to the State of Pennsylvania, as a collateral inheritance tax. On the demand of the defendant, and to avoid the payment of interest and penalties, the plaintiff, on March 26th, 1919, paid the amount of said assessment, at the same time making protest in due form, with notice of intention to proceed for the recovery of that portion of the amount which plaintiff claimed should not be included in the assessment.

On March 29th, 1919, the plaintiff duly filed with the defendant, her petition for refund and on April 7th, 1919, the Commissioner of Internal Revenue notified plaintiff that her petition for refund was refused. The portion of the estate tax assessed by the inclusion of the bonds of political subdivisions of the State of Pennsylvania is $9,117.25. The portion of the estate tax assessed by the inclusion of

the amount paid to the State of Pennsylvania as collateral inheritance taxes is $2,817.69.

Referring to the Act of Congress, we find Section 2 provides "that a tax * * * is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act" etc. By the very terms of the Act, the tax is imposed upon the transfer only. The amount of the tax is to be ascertained from a consideration of the net estate and the application thereto of percentages varied in proportion to the amount thereof.

That Congress has power to impose a tax upon the transfer or passing of a decedent's estate is unquestionably determined by the case of Knowlton vs. Moore, 178 U. S. 41. But it is urged that where
13 the bonds of political subdivisions of a State are included in the net estate of a decedent, ascertainment and assessment of the tax under the statute is in effect a tax upon the bonds themselves and therefore a tax upon one of the instrumentalities of the state government, and reliance is placed, to some extent, upon the decision of the Supreme Court in Pollock vs. Farmers' Loan & Trust Co., 157 U. S. 429, which, inter alia, emphasized the principle that "a tax upon income derived from the interest of bonds issued by a municipal corporation is a tax upon the power of the state and its instrumentalities to borrow money and consequently repugnant to the Constitution of the United States."

We cannot pause to note the ultimate effect upon municipal bonds by the application of the estate tax and the ultimate effect upon them by the application of an income tax or any similarities that may suggest themselves. We should only note the difference between them as pointed out and determined by law. The tax upon the income from municipal bonds is in effect a tax upon the said bonds. The estate tax is not a tax upon the income or upon the bonds, it is a tax upon the transfer thereof, if either bonds or income therefrom, or both, are included in the net estate as ascertained under the provisions of said Act.

In Plummer vs. Coler, 178 U. S. 115, it is squarely decided that a state, in assessing a tax upon the right or privilege of taking property by will or descent, may lawfully measure or fix the amount of the tax by referring to the value of the property passing; and the incidental fact that such property is composed, in whole or in part, of Federal securities, does not invalidate the state tax, or the law under which it is imposed. That case is but slightly different from the case at bar. There, the securities were bonds of the United States; here the securities are bonds of political subdivisions
14 of the state. The bonds in that case have the same relation to the taxing power then being exercised as the bonds in this case have to the taxing power exercised here.

As stated in Pollock vs. Farmers' Loan & Trust Company, supra. (at bottom of page 583)—

"The Constitution contemplates the independent exercise by the Nation and the State, severally, of the constitutional powers.

As the States cannot tax the powers, the operations, or the property of the United States, nor the means which they employ to carry their powers into execution, so it has been held that the United States have no power under the Constitution to tax either the instrumentalities or the property of a State.

A municipal corporation is the representative of the State and one of the instrumentalities of the state government."

It seems plain therefore, that under controlling decisions, the portion of the tax, to wit: $9,117.25 paid by the plaintiff, was lawfully assessed, because it was a tax, not upon the bonds, or their income, but upon the transfer or passing thereof, because the value thereof was included within the net estate as determined under the provisions of the Act.

We take up now the claim of the plaintiff so far as it relates to the inclusion in the assessment of the amount paid by plaintiff to the State of Pennsylvania as collateral inheritance tax, which amounts to $2,817.69. In the disposition of this question, we are controlled by the decision of the Circuit Court of Appeals for the Third Circuit in the case of Lederer, Collector, vs. Northern Trust Company et al. — Fed. Rep. —, affirming Northern Trust Company et al. vs. Lederer, Collector, 257 Fed. Rep. 812. It was expressly ruled in that case that the collateral inheritance tax of Pennsylvania is an estate tax, and therefore a charge against the estate, and the amount of such tax should be deducted from the gross amount in ascertaining the net estate, before the tax upon the transfer thereof is assessed, under the Act of Congress above mentioned. It follows therefore, that the plaintiff should have been allowed a deduction from the amount paid by her, of $2,817.69, being that portion of the estate tax assessed on the part of the estate of plaintiff's decedent paid out for collateral inheritance tax in Pennsylvania.

Judgment must therefore be entered in favor of the plaintiff and against the defendant for the sum of Two thousand eight hundred seventeen and 69/100 ($2,817.69) Dollars, with interest thereon from the date of payment—March 26th, 1919.

Filed Aug. 27, 1920.

16 In the District Court of the United States for the Western District of Pennsylvania, Nov. Term, 1919.

No. 2200.

MARY LOUISE GREINER, Executrix under the Last Will and Testament of Kate B. Kingsley, Deceased,

vs.

C. G. LEWELLYN, Collector of Internal Revenue for the Twenty-third District.

Order of Court of August 27th, 1920.

Order entered on Argument List: "And now, August 27, 1920, the Court finds for the Plaintiff and directs judgment to be entered in favor of the Plaintiff and against the Defendant in the sum of $2,817.69 with interest from March 26, 1919. Per Curiam."

17 In the District Court of the United States for the Western District of Pennsylvania, Nov. Term, 1919.

No. 2200.

MARY LOUISE GREINER, Executrix under the Last Will and Testament of Kate B. Kingsley, Deceased,

vs.

C. G. LEWELLYN, Collector of Internal Revenue for the Twenty-third District.

Judgment.

Aug. 27th, 1920, pursuant to order of Court, judgment is hereby entered in favor of the plaintiff and against the defendant, C. G. Lewellyn, Collector of Internal Revenue for the 23rd District of Pennsylvania in the sum of Two thousand eight hundred and seventeen and 69/100 dollars ($2,817.69) with interest from March 26, 1919.

J. WOOD CLARK,
Clerk.

18 In the District Court of the United States for the Western District of Pennsylvania, November Term, 1919.

No. 2200.

MARY LOUISE GREINER, Executrix under the Last Will and Testament of Kate B. Kingsley, Deceased,

vs.

C. G. LEWELLYN, Collector of Internal Revenue for the Twenty-third District.

Plaintiff's Exceptions.

And now, to wit, September 8th, 1920, comes the plaintiff, by her attorney, W. D. Stewart, and excepts to the action of the Court in the above entitled case as follows:

1. The learned Court erred in the following portion of its opinion: "The tax upon the income from municipal bonds is in effect a tax upon the said bonds."

2. The learned Court erred in the following portion of its opinion: "In Plummer v. Coler, 178 U. S. 115, it is squarely decided that a state, in assessing a tax upon the right or privilege of taking property by will or descent, may lawfully measure or fix the amount of the tax by referring to the value of the property passing; and the incidental fact that such property is composed, in whole or in part, of Federal securities, does not invalidate the state tax, or the law under which it is imposed. That case is but slightly
19 different from the case at bar. There, the securities were bonds of the United States; here the securities are bonds of political subdivisions of the state. The bonds in that case have the same relation to the taxing power then being exercised as the bonds in this case have to the taxing power exercised here."

3. The learned Court erred in the following conclusion of law:

"It seems plain, therefore, that under controlling decisions, the portion of the tax, to wit, $9,117.25 paid by the plaintiff, was lawfully assessed, because it was a tax, not upon the bonds, or their income, but upon the transfer or passing thereof, because the value thereof was included within the net estate as determined under the provisions of the Act."

4. The learned Court erred in entering the following judgment: "Judgment must therefore be entered in favor of the plaintiff and against the defendant for the sum of two thousand eight hundred seventeen and 69/100 ($2,817.69) dollars, with interest thereon from the date of payment—March 26th, 1919."

5. The learned Court erred in refusing to enter judgment in favor of the plaintiff and against the defendant for the additional amount claimed, to wit, $9,117.25, with interest thereon from March 26, 1919.

W. D. STEWART,
Attorney for Plaintiff.

20 *Order of Court.*

And now, to wit, September 8th, 1920, upon consideration of the foregoing exceptions it is ordered that the same be and they are hereby overruled, to which action of the Court the plaintiff excepts, and at the instance of counsel for plaintiff a bill of exceptions allowed and sealed.

[SEAL.] CHARLES P. ORR,
Judge United States District Court for the Western District of Pennsylvania.

Filed September 8, 1920.

21 In the District Court of the United States for the Western District of Pennsylvania, November Term, 1919.

No. 2200.

MARY LOUISE GREIMER, Executrix, etc.,

vs.

C. G. LEWELLYN, etc.

Order of Court.

And now, to wit, October 23rd, 1920, on motion of counsel for plaintiff it is hereby ordered that the term of this court at which the above entitled case was heard and determined is hereby extended until February 1, 1921 for the purpose of enabling the plaintiff to present and have allowed and signed its bill of exceptions therein.

Per CURIAM.

I hereby consent to the foregoing order.

D. J. DRISCOLL,
A. P. B.,
United States Attorney.

October 22, 1920.

Filed October 23, 1920. J. Wood Clark, Clerk.

22 In the District Court of the United States for the Western District of Pennsylvania, November Term, 1919.

No. 2200.

MARY LOUISE GREINER, Executrix under the Last Will and Testament of Kate B. Kingsley, Deceased,

vs.

C. G. LEWELLYN, Collector of Internal Revenue for the Twenty-third District.

Bill of Exceptions.

Be It Remembered that at the above Number and Term came into this Court Mary Louise Greiner, Executrix under the last will and testament of Kate B. Kingsley, deceased, and C. G. Lewellyn, Collector of Internal Revenue for the Twenty-third District, and filed a stipulation as to the facts, (see Stipulation), and thereupon issue was duly joined, and afterwards, to wit, at a session of this Court held on the 17th day of February, A. D. 1920, the said issue came on to be tried before Honorable Charles P. Orr, District Judge, without a jury, (see Waiver of Jury Trial), at which time appeared the plaintiff and defendant by their respective attorneys, and on the 27th day of August, A. D. 1920, the Court filed its opinion, (see Opinion of Court), and on the 27th day of August, 1920, the Court ordered and directed the Clerk of this Court to enter judg-
23 ment for Mary Louise Greiner, Executrix, etc., plaintiff, in the sum of $2,817.69, and refused to enter judgment in favor of the plaintiff and against the defendant in the sum of $9,117.25, which additional amount was claimed by plaintiff, (see Order), and counsel for plaintiff thereupon duly excepted to the said order of the Court and his conclusions of law upon which said Order is based, (see Exceptions), which exceptions were duly noted and the bill sealed.

Whereupon, on the 9th day of November, A. D. 1920, the said plaintiff filed her petition for a writ of error and presented her said petition with her assignment of errors and on the same day said writ was duly allowed and issued and a citation was thereupon issued and served upon counsel for the defendant, and thereupon the aforesaid Judge did to this bill of exceptions, in pursuance of the request of plaintiff in error and the law, put his seal this 9th day of November, A. D. 1920.

CHARLES P. ORR, [SEAL.]
Judge of the United States District Court for the Western District of Pennsylvania.

The foregoing Bill of Exceptions presented to *us* and found to be correct.

D. J. DRISCOLL,
Attorneys for Defendant.

October 21, 1920.

Filed November 9, 1920.

24 In the District Court of the United States for the Western District of Pennsylvania, November Term, 1919.

No. 2200.

MARY LOUISE GREINER, Executrix under the Last Will and Testament of Kate B. Kingsley, Deceased,

vs.

C. G. LEWELLYN, Collector of Internal Revenue for the Twenty-third District.

Assignment of Errors.

And now, to wit, November 9th, 1920, comes the plaintiff in error, by her attorney, W. D. Stewart, and files the following assignment of errors in connection with her petition for writ of error in the above entitled case:

1. The learned Court below erred in entering the following judgment:

"And now, August 27, 1920, the Court finds for the Plaintiff and directs judgment to be entered in favor of the plaintiff and against the defendant for the sum of two thousand eight hundred and seventeen and sixty-nine hundredths dollars ($2,817.69), with interest from March 26, 1919.

Per CURIAM."

to which order plaintiff excepts and at her instance a bill of exceptions is allowed and seal. Charles P. Orr, District Judge (Seal).

"Aug. 27, 1920, pursuant to order of court, judgment is hereby entered in favor of the plaintiff and against the defendant, C. G. Lewellyn, Collector of Internal Revenue for the 23rd District of Pennsylvania, in the sum of $2,817.69, with interest from March 26, 1919. J. Wood Clark, Clk."

2. The learned Court erred in refusing to enter judgment in favor of the plaintiff and against the defendant for the additional amount claimed, to wit, nine thousand one hundred and
25 seventeen dollars and twenty-five cents ($9,117.25) with interest thereon from March 26, 1919.

3. The learned Court erred in the following conclusion of law: "It seems plain, therefore, that under controlling decisions, the portion of the tax, to wit, $9,117.25 paid by the plaintiff, was lawfully assessed, because it was a tax, not upon the bonds, or their income, but upon the transfer or passing thereof, because the value thereof was included within the net estate as determined under the provisions of the Act."

W. D. STEWART,
Attorney for Plaintiff in Error.

26 In the District Court of the United States for the Western District of Pennsylvania, November Term, 1919.

No. 2200.

MARY LOUISE GREINER, Executrix under the Last Will and Testament of Kate B. Kingsley, Deceased,

vs.

C. G. LEWELLYN, Collector of Internal Revenue for the Twenty-third District.

Petition for Writ of Error.

To the Honorable Charles P. Orr,
Judge of the United States District Court
for the Western District of Pennsylvania.

Mary Louise Greiner, Executrix under the last will and testament of Kate B. Kingsley, deceased, plaintiff in the above entitled case, by her attorney, W. D. Stewart, considering herself aggrieved by the rulings and decisions of the Court in the above entitled cause and by judgment therein, hereby makes application for writ of error to the Supreme Court of the United States in order that the said Supreme Court of the United States may review the action of the court below, and prays that a writ of error may be allowed; that the transcript of the record, proceedings and papers in said cause duly authenticated may be sent to the said Supreme Court of the United States as the law in such case provides; to
27 the end that the judgment of this Honorable Court in said case may be reversed.

W. D. STEWART,
Attorney for Plaintiff in Error.

Filed November 9, 1920.

28 *Order.*

And now, to wit, November 9th, 1920, on presentation of the foregoing petition and on motion of W. D. Stewart, attorney for plaintiff, a writ of error is hereby granted the plaintiff to the Supreme Court of the United States as is therein prayed for. I further certify that the question involved in the case in this Court was the

Constitutional power of Congress to tax bonds of the political subdivisions of the State of Pennsylvania under the Federal Estate Tax Act of 1916.

CHARLES P. ORR,
United States District Judge.

29 In the District Court of the United States for the Western District of Pennsylvania, November Term, 1919.

No. 2200.

MARY LOUISE GREINER, Executrix, etc.

vs.

C. G. LEWELLYN, Collector of Internal Revenue, etc.

Stipulation as to Record on Writ of Error.

The undersigned, counsel for plaintiff and defendant, hereby stipulate that in making up the transcript of the record on the writ of error herein to the Supreme Court of the United States the following shall constitute the record:

1. Amended stipulation of facts.
2. Stipulation waiving jury trial.
3. Opinion of Court.
4. Order of August 27th, 1920.
5. Clerk's entry of judgment.
6. Plaintiff's exceptions and Order of Court thereon.
7. Order extending term.
8. Bill of exceptions.
9. Assignments of error.
10. Petition for writ of error and order therein.
11. Stipulation as to record.
12. Docket Entries.

W. D. STEWART,
Attorney for Plaintiff.
D. J. DRISCOLL,
Attorney for Defendant.

Filed November 18, 1920.

30 *Certificate.*

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

I, J. Wood Clark, Clerk of the District Court of the United States, for the Western District of Pennsylvania, do hereby certify that

the annexed and foregoing pages contain a true and correct copy of the record of proceedings ordered to be printed in the above entitled case, so full and entire as the same remains of record and on file in my office, in the City of Pittsburgh, in said District.

In testimony whereof, I have hereunto signed my name and affixed the seal of the said Court at Pittsburgh this 23d day of November, A. D. 1920.

[Seal of U. S. District Court W. D. Pennsylvania.]

J. WOOD CLARK,
Clerk.

31 *Citation.*

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

To C. G. Lewellyn, Collector of Internal Revenue for the Twenty-third District, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Supreme Court to be holden at City of Washington, D. C., on the 20th day of December next, pursuant to an appeal filed in the office of the Clerk of the District Court of the United States for the Western District of Pennsylvania, wherein Mary Louise Greiner, Executrix under the last will and testament of Kate B. Kingsley, deceased, is Plaintiff-in-Error, and you are Defendant-in-Error to show cause if any you know or have to say why the Judgment rendered against the said Plaintiff-in-Error, as in the said appeal appears, should not be duly reversed, and full and speedy justice done to the parties aforesaid in this behalf.

Witness my hand this 19th day of November, 1920.

CHAS. P. ORR,
Judge.

Service of the above Citation accepted this 19th day of November, 1920.

D. J. DRISCOLL,
U. S. Attorney.

[Endorsed:] No. 2200. Nov. 7, 1919. Mary Louise Greiner, etc., vs. C. G. Lewellyn, Coll. (2881.)

Endorsed on cover: File No. 28,011. W. Pennsylvania D. C. U. S. Term No. 654. Mary Louise Greiner, executrix under the last will and testament of Kate B. Kingsley, deceased, plaintiff in error, vs. C. G. Lewellyn, Collector of Internal Revenue. Filed December 20th, 1920. File No. 28,011.

Office Supreme Court, U. S.
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WM. R. STANSBURY
CLERK

Supreme Court of the United States

NO. 187 OCTOBER TERM, 1921.

MARY LOUISE GREINER, Executrix under the Last Will and Testament of KATE B. KINGSLEY, Deceased, Plaintiff-in-Error,

vs.

C. G. LEWELLYN, Collector of Internal Revenue.

In Error to the District Court of the United States for the Western District of Pennsylvania.

BRIEF FOR PLAINTIFF-IN-ERROR.

CHARLES M. THORP,
R. G. BOSTWICK,
W. D. STEWART,
Attorneys for Plaintiff-in-Error.

Smith Bros. Co. Inc., Legal Printers, 407-409 Grant Street, Pittsburgh, Pa.

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Supreme Court of the United States

NO. 187 OCTOBER TERM, 1921.

MARY LOUISE GREINER, Executrix under the Last Will and Testament of KATE B. KINGSLEY, Deceased, Plaintiff-in-Error,

vs.

C. G. LEWELLYN, Collector of Internal Revenue.

In Error to the District Court of the United States for the Western District of Pennsylvania.

Statement.

The facts of this case were agreed upon (R-2), and the case submitted to the Court without a jury by a written waiver (R-8), and disclose that Plaintiff-in-Error, pursuant to directions from the Commissioner of Internal Revenue, filed her return as Executrix of the Estate of Kate B. Kingsley, deceased, under the provisions of the Estate Tax Act of 1916, protesting, however, against the inclusion in the return, of so much of the estate as was invested in bonds of the political

sub-divisions (County, road and school districts), of the State of Pennsylvania, and so much of the estate as had been paid out for the Estate Tax of Pennsylvania. Despite her protest, Plaintiff-in-Error was required to and paid the estate tax on both items under protest and took the required steps to obtain a refund of the amount which she claimed was illegally assessed and exacted of her. The petition for refund was refused by the Commissioner of Internal Revenue and suit was instituted. The amount of tax paid on the bond item was $9,117.25 and on the Pennsylvania Estate Tax was $2,817.69. The Court entered judgment for the plaintiff below on the Pennsylvania Tax item, but refused to enter judgment on the bond item, to which action plaintiff duly excepted. The Court made an order overruling the exceptions to which the plaintiff excepted and took this writ of error.

The question involved is,—

Whether the Federal Government has power, under the provisions of the Estate Tax Act, (Act Sept. 8, 1916, C. 463, Title II, Par. 201, *et. seq.*) to tax so much of a decedent's estate as is invested in bonds of the political subdivisions of the Commonwealth of Pennsylvania.

Specifications of Error.

1. The Court erred in holding that bonds of the political subdivisions of the State of Pennsylvania were taxable under the Estate Tax Act of 1916. (R-17).

2. The Court erred in refusing to enter judgment in favor of the plaintiff in the sum $9,117.25 with interest thereon from March 25, 1919, being the amount of the Estate Tax paid by Plaintiff-in-Error on the portion of the decedent's estate invested in bonds of the political subdivisions of the State of Pennsylvania. (R-14).

3. The Court erred in overruling plaintiff's exception to its refusal to enter judgment for the plaintiff in the sum of $9,117.25 with interest thereon from March 26, 1919. (R-14).

4. The Court erred in holding that the Federal Government had the same power in collecting inheritance taxes on State bonds as the States had in collecting inheritance taxes on Federal Bonds. (R-13).

5. The Court erred in holding that *Plummer vs. Coler*, 178 U. S., 115, ruled the question in the present case.

Argument.

It is respectfully submitted, the Federal Government has no power to levy a tax, either directly or indirectly, upon bonds in a decedent's estate of the political subdivisions of the State of Pennsylvania or those of any other State. The form of taxation is immaterial. The insurmountable obstacle which confronts the Federal Government is the absolute lack of power to tax.

The Estate Tax is conceded to be indirect, because of the occasion giving rise to the exercise of the taxing power, but nevertheless on property—(*N. Y. Trust Co. et al. vs. Eisner*, 41 Sup. Ct. Rep., 506).

The levy exacted by the Estate Tax Act is a tax. It is not a direct tax but is an excise, but this latter form of levy is a tax although indirect. *Nicol vs. Ames*, 173 U. S., 509-519; *Knowlton vs. Moore*, 178 U. S., 41; *Thomas vs. U. S.*, 192 U. S., 363; *New York Trust Co. Executor of Purdy vs. Eisner, supra; U. S. vs. Woodward*, (U. S. Supreme Court, decided June 6, 1921).

I

LACK OF POWER TO DIRECTLY OR INDIRECTLY TAX STATE BONDS.

That the Federal Government lacks the power to tax municipal securities was settled beyond doubt by *Pollock vs. Farmers Loan & Trust Company*, 157 U. S., 429, in which Chief Justice Fuller said, at page 583:

> "Another question is directly presented by the record as to the validity of the tax levied by the act upon the income derived from municipal bonds. * * *
>
> The law under consideration provides 'that nothing herein contained shall apply to States, counties or municipalities.' It is contended that although the property or revenues of the States or their instrumentalities cannot be taxed, nevertheless the income derived from state, county and municipal securities can be taxed. But we think the same want of power to tax the property or revenues of the States or their instrumentalities exists in relation to a tax on the income from their securities, and for the same reason, and that reason is given by *Chief Justice Marshall in Weston vs. Charleston*, 2 Pet., 449, 468 * * *."

Mr. Justice Harlan on page 654, in his dissenting opinion, said:

> "In regard to the right to include in an income tax the interest upon the bonds of municipal corporations, I think the decisions of this Court,

holding that the Federal Government is without power to tax the agencies of the state government, embrace such bonds, and that this settled line of authority is conclusive upon judgment here. It determines the question that where there is no power to tax for any purpose whatever, no direct or indirect tax can be imposed. The authorities cited in the opinion are decisive of this question. They are relevant to one case and not to the other, because, in the one case, there is full power in the Federal Government to tax, the only controversy being whether the tax imposed is direct or indirect; while in the other there is no power whatever in the Federal Government, and, therefore, the levy, whether direct or indirect, is beyond the taxing power."

Mr. Justice Harlan on page 654, in his dissenting opinion said:

"In such a case, it is immaterial to inquire whether the tax is, in its nature or by its operation, a direct or an indirect tax; for the instrumentalities of the states—among which, as is well settled, are municipal corporations, exercising powers and holding property for the benefit of the public—are not subjects of national taxation, in any form or for any purpose, * * *. So it has been frequently adjudged, and the question is no longer an open one in this court."

In the same case, upon re-argument, (158 U. S., 601) at page 618, Mr. Chief Justice Fuller said:

"* * * as to the income from the muni-

cipal bonds, that could not be taxed because of want of power to tax the source, and no reference was made to the nature of the tax as being direct or indirect."

Mr. Justice Brown in his dissenting opinion, said at page 693:

"The tax upon the income of the municipal bonds falls obviously within the other category, of an indirect tax upon something which Congress has no right to tax at all, and hence is invalid. Here is a question, not of the method of taxation, but of the power to subject the property to taxation in any form."

The question here involved has never been before any other Federal Court, but it is respectfully submitted that the inevitable conclusion from *Pollock vs. Farmers Loan & Trust Co.*, 157 U. S., 429, is, that the Estate Tax cannot be imposed upon the transfer of municipal bonds by a decedent. In that case, where this learned Court held, beyond any doubt, those provisions of the Income Tax Act of 1894 unconstitutional, which sought to impose a tax upon the bonds of municipalities and the income therefrom, the Court had before it in Section 28 of the Act of 1894, a provision of the Income Tax Act which was the equivalent of an inheritance tax. (Pg. 435 for Sec. 28).

II

INCOME AND INHERITANCE TAXES ARE ALIKE IN PRINCIPLE.

There is no distinction in principle between an income tax and an inheritance tax, *Scholey vs. Rew*, 23 Wall., 331.

In *Knowlton vs. Moore*, 178 U. S., 41, at page 79, this learned Court said:

> "As in the course of the opinion in Scholey vs. Rew, the court said that the taxes on successions could not be distinguished in principle from an income tax, therefore the decision in the Pollock case, which held that an income tax is direct, it is argued, necessarily decided that an inheritance tax was also direct. But in the Pollock case, the decision in Scholey vs. Rew was not overruled. On the contrary, the correctness of the decision in the latter case as to the particular matter which is actually decided in effect was reaffirmed."

The reason for the foregoing statement is that the Pollock case decided a tax on incomes derived from real estate and from personal property was direct, and therefore unconstitutional, but as to taxes on incomes derived from professions, trades, employments or vocations, the tax was indirect, and therefore not unconstitutional, but by reason of the impossibility of distinguishing between the various provisions of this act of Congress then before the Court, the entire act was de-

clared unconstitutional. This is clear as will appear from an examination of *Brushhaber vs. Union Pacific R. R.*, 240 U. S., at page 17:

> "Nothing could serve to make this clearer than to recall that in the Pollock case insofar as the law taxed incomes from other classes of property than real estate and invested personal property, that is, income from 'professions, trades, employments, or vocations,' (158 U. S. 637), its validity was recognized; indeed it was expressly declared that no dispute was made upon that subject and attention was called to the fact that taxes on such income had been sustained as excise taxes in the past. *Id.* p. 635."

Notwithstanding, it is beyond dispute (*Nicol vs. Ames*, 173 U. S., 509, 519, *Ins. Co. vs. Soule*, 7 Wall., 433, 434), that an income tax on salaries, professions, etc., is an indirect tax, it has been decided that it is beyond the power of the Federal Government to collect an income tax on the salary of a Judge of a State Court, *Buffington vs. Day*, 11 Wall., 122, and upon income received by a municipality—*U. S. vs. B. & O.*, 17 Wall., 323.

The Internal Revenue Department concedes that it cannot collect an income tax upon the fees of a Notary Public. Regulations 45-2875b.

III.

OTHER EXAMPLES OF LACK OF POWER TO INDIRECTLY TAX STATE AGENCIES.

A stamp tax is admittedly an indirect tax, but the Federal Government cannot collect it upon the bond of a Notary Public, *Stirneman vs. Smith*, 100 Fed., 600 (C. C. A. 8th Cir); *Bettman vs. Warwick*, 108 Fed., 46, (C. C. A. 6th Cir); nor upon a liquor license bond required by a State, *Ambrosini vs. United States*, 187 U. S., 1; nor upon an administrator's bond, *McNally vs. Field*, 119 Fed., 445; nor upon a State tax certificate, *Borden vs. Columbia County*, 33 Wis., 447; nor upon legal process from a State Court, *Jones vs. Keep*, 19 Wis., 370.

In *Snyder vs. Bettman*, 190 U. S., 249, Mr. Justice Brown, for the majority, referring to the fact that the Internal Revenue Act of 1862 imposed a stamp tax on the probate of wills, issue of letters of administration, writs and original processes for the commencement of suits, observed that, where applied to State Courts, its constitutionality was doubtful.

A state income tax is an excise tax and is not a property tax—Opinion of Justices, 77 N. H., 61: *Purnell vs. Page*, 133 N. Car., 125; *State vs. Nygaard*, 159 Wis., 396, but a State cannot impose an income tax on so much of an individual's income as is derived from United States bonds—Opinion of Justices, 53 N. H., 634. Nor upon salary from a Federal Office—*Biscoe vs. Commissioner* (Mass.), 128 N. E., 16.

It is respectfully submitted that it has been demonstrated above, that, except for an income tax on income from real estate and personalty, such tax is an indirect one and stamp taxes are as well indirect and in the case of both these indirect taxes the absolute lack of power of the Federal Government to tax States agencies exists and there being no distinction in principle between these taxes and the tax involved in the present case, it therefore follows the Federal Government is as well without power to levy the estate tax upon so much of a decedent's estate as is invested in bonds of the political subdivisions of the State of Pennsylvania.

IV.

REASONING OF DISSENT IN SNYDER VS. BETTMAN

It is respectfully submitted that *Pollock vs. Trust Co., supra*, conclusively settles the question now before the Court. In addition, the most persuasive reasoning of the three dissenting justices (Mr. Justice White, Mr. Chief Justice Fuller, Mr. Justice Peckham) in *Snyder vs. Bettman*, 190 U. S., 249, 255 is so peculiarly applicable to the present case and is so well founded in principle and law as to be unanswerable, it is respectfully submitted. In that able dissent, Mr. Justice White said, in part:

> "Nothing is better settled than that the United States has no power to tax the governmental attributes of the States, and that municipal corporations

are agencies of the States and not subject, as to their public rights and duties, to direct or indirect taxation by the United States. The doctrine has nowhere been more clearly stated than in *Pollock vs. Farmers' Loan & Trust Co.*, 157 U. S., 429, 583-584. In that case, despite the division of opinion on other questions, the court was unanimous in holding that, in any event, income subject to taxation by the United States could not include interest derived from municipal bonds, because to include such interest in income subject to taxation would amount at least to an indirect charge upon a State governmental agency. * * *

It is true that in *United States vs. Perkins*, 163 U. S., 625, and *Plummer vs. Coler*, 178 U. S., 115, it was held in the one case that an inheritance tax of the State of New York could be taken out of a bequest to the United States, and in the other that a bequest of bonds of the United States was subject to a State inheritance tax. It is also true that in *Knowlton vs. Moore*, 178 U. S., 41, it was decided that the United States had the power to impose an inheritance tax. But the ruling in none of these cases, in my opinion, sustains the decision now made. The power of the State of New York, which was upheld in both the Perkins and Coler cases, rested not simply on the authority of that State to impose an inheritance tax, but upon its admitted right to regulate the transmission or *receipt of property by death. On the other hand, the right of the United States to levy an inheritance tax, which was upheld in Knowlton vs. Moore, was based solely upon the power of the United States*

to tax, and that case therefore conveys no intimation that there is authority in the United States to levy an inheritance tax upon an object which it has no power under the Constitution to tax at all, either directly or indirectly. The distinction between the two, that is, between the broader power of a State resulting from its authority not only to tax but also to regulate the transmission or receipt of property by death, and the narrower power, that is, of taxation alone vested in the government of the United States, was explicity pointed out in Knowlton vs. Moore, supra, at page 57. (Italics ours). Moreover, attention was specially directed to the obvious distinction between the two on page 58, where it was said:

> 'Of course, in considering the power of Congress to impose death duties, we eliminate all thought of a greater privilege to do so than exists as to any other form of taxation, as the right to regulate successions is vested in the States and not in Congress.'

So, also, the difference between the two had been previously accentuated in *Magoun vs. Illinois Trust & Savings Bank*, 170 U. S., 287, 288. There is no confusion between the two classes of cases, and no room in reason seems to me to exist for the assumption that things which are different are nevertheless one and the same. On the contrary, to my mind it appears that misconception will necessarily be caused by confounding wholly different powers and from supposing that because a particular result is justified where a specified power ex-

ists, the same consequence must obtain where the power upon which it depends is wanting. Certainly, I assume it cannot be said because a State has the right to regulate successions and, therefore, to prevent property from passing by death to the United States, hence also the United States must have power by regulating successions to prevent property from passing by death to a State or its governmental agencies. And yet, in my opinion, this is the logical consequence of the doctrine that because the States may in virtue of an authority belonging to them accomplish a particular result as regards the United States, therefore the United States must have the right to bring about the same thing to the States. The United States not possessing, as the States do, the right to regulate successions, when the United States calls into play its taxing power over the subject of the passage or receipt of property by death, the extent of its authority is to be measured solely by the scope of the taxing power conferred by the constitution. When, on the contrary, the State imposes a burden upon the passage or receipt of property by death, its right to do so, if not sustainable by the exercise of the taxing power, finds adequate support in the authority vested in it to regulate the transmission or receipt of property on the occasion of death. This was clearly pointed out in *United States vs. Perkins, supra*, 630, where it was said: 'The legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax, and it is only upon this condition that the legislature assents to a bequest of it.' * * *

* * * "Assuredly, the inclusion in income subject to taxation of an amount derived from interest on municipal bonds is less directly on the bonds than is the tax in this case, on the right of the municipality to take, and yet, as I have said in *Pollock vs. Farmers' Loan & Trust Company*, the tax on an income made up in part of interest on a municipal bond was declared to be void, because, even if indirect, it could not be levied where there was no power to tax at all."

V.

THERE ARE NO CASES IN POINT.

It will probably be argued by the Government that *Snyder vs. Bettman, supra; Murdock vs. Ward*, 178 U. S., 139; *Plummer vs. Coler*, 178 U. S., 115, support its contention in the present case. The lower Court bases its conclusion on *Plummer vs. Coler* (R., p. 10).

Snyder vs. Bettman, involves the question of whether the Federal Government could levy a legacy tax upon a bequest to a municipality. The Court held that it could and it is submitted that this conclusion does not affect the present question, for the reason the municipality in that case could not assert that it was taking the property in a governmental capacity. The municipality was simply taking a bequest of the testator's property and the tax was upon the testator's property as such. (Plummer vs. Coler, page 132.) There was, therefore, no interference with any governmental

function of the municipality. In other words, the legatee, although a sovereign body, took its legacy, not by virtue of sovereignty, but solely by virtue of the act of the testator and the legacy paid the tax and not the legatee. There was no personal liability on the part of the legatee for the amount of the tax. (*South Carolina vs. United States*, 199 U. S., 437, 438.) In examining this case, the natural question arises as to whether the result would have been the same in that case had the bequest consisted of municipal bonds, especially in view of the theory that the tax only incidentally affected the municipality. Had this been the situation, the case would be in point.

Murdock vs. Ward, involved the question as to whether it impaired the obligation of the contract for the Federal Government to impose the legacy tax under the Act of 1898 upon so much of the decedent's estate as consisted of United States bonds. It is submitted without further discussion that the holding of the Court that the tax could be collected and that it did not involve an impairment of the obligation of the contract has no bearing whatever upon the instant case. Moreover, there was no lack of power to tax involved.

Plummer vs. Coler, involved the question as to whether a state inheritance tax could be imposed upon a legacy consisting of United States bonds. It was held that the tax could be collected and it will no doubt be argued by the government that if the state can impose an inheritance tax upon United States bonds that by the same token the United States has the right to

impose an estate tax upon state bonds. The lower Court in the instant case, so held.

It is respectfully submitted that this is a *non sequitur*. This learned Court, in *United States vs. Perkins*, 163 U. S., 625, recognized that the inheritance tax of the State of New York was not a tax at all, although it was levied in the form of a tax. In that case, the Court distinctly said that: (p. 628).

> "* * * The so-called 'inheritance tax' of the State of New York is in reality a limitation upon the power of a testator to bequeath his property to whom he pleases; a declaration that, in the exercise of that power, he would contribute a certain percentage to the public use; in other words, that the right to dispose of his property by will shall remain, but subject to a condition that the State has a right to impose. Certainly, if it be true that the right of testamentary disposition is purely statutory, the state has a right to require a contribution to the public treasury before the bequest shall take effect. Thus, the tax is not upon the property, in the ordinary sense of the term, but upon the right to dispose of it, and it is not until it has yielded its contribution to the state that it becomes the property of the legatee."

It is respectfully submitted that the fair inference from the reasoning of this learned Court in this case is, that as a tax the exaction could not be sustained, but as a regulation of testamentary disposition the levy was valid.

To the same effect is *Orr vs. Gilman,* 183 U. S., 278.

And in *Mager vs. Grima,* 8 Howard, 490, speaking of the Louisiana legacy tax, this learned Court said: (Approved in U. S. vs. Perkins, *supra*):

> "Now the law in question is nothing more than an exercise of the power which every state and sovereignty possesses, of regulating the manner and terms upon which property, real or personal, within its dominion may be transmitted by last will and testament, or by inheritance, and of prescribing who shall and who shall not be capable of taking it. * * * And if a State may deny the privilege altogether, it follows that, when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy."

In matter of Sherman, 153 N. Y., 1, (quoted with approval in Plummer vs. Coler, at page 124), the Court said:

> "The so-called tax is an exaction made by the State in the regulation of the right of devolution of property of decedents, which is created by law, and which the law may restrain or regulate. Whatever the form of the property the right to succeed to it is created by law, and if the property consists of government securities, the transferee derives his right to take them as he does his right to take any other property of the decedent, under the laws of the State, and the State by these statutes makes the right subject to the burden imposed."

The following cases serve to further illustrate the nature of the so-called inheritance or succession taxes of the various states:

Estate of Swift, 137 N. Y., 77, 81,—

"The idea of this succession tax as we conveniently term it, is more or less compound; the principle idea being the subjection of property, ownership of which has ceased by reason of the death of its owner, to a diminution, by the State reserving to itself a portion of its amount, if in money, or of its appraised value, if in other forms of property."

Billings vs. Illinois, 188 U. S., 97, 104:

"We must regard the power of the State over testate and intestate dispositions of property, its power to create and limit estates, and, as resulting, its power to impose conditions upon their transfer or devolution. It is upon this power that inheritance tax laws are based. * * *"

Strauss vs. State, 36 N. Dakota, 594, 601:

"The so-called inheritance tax is, strictly speaking, not a tax at all * * *."

People vs. Griffith, 245 Ill., 532, 537:

"* * * they are not 'taxes' in the strict sense of the term * * *."

Matter of Hamilton, 148 N. Y., 310, 313:

"The tax (so-called) is the toll or impost appropriated to itself by the State * * *."

Warner vs. Corbin, 91 Conn., 536:

"In fact they are not taxes in any true sense * * *."

It is not the exercise of the taxing power—*State vs. Guinotte*, 204 S. W. R., 806; *Eyre vs. Jacob*, 14 Gratt. (Va.), 422, 430; *State vs. Alston*, 94 Tenn., 674, 681; *Finnen's Estate*, 196 Pa., 72, 75.

The power of testamentary disposition or succession to a decedent's estate is purely a matter of statutory grant and if the State sees fit, it may withhold the privilege altogether; (*Neilson vs. Russell*, 76 N. J. L., 27), (U. S. vs. Perkins, *supra*), (*Matter of Watson*, 226 N. Y., 384, 395) and it therefore becomes clear that it is entirely immaterial whether the estate of a decedent be composed of United States Bonds or anything else, for to assert the contrary would be to hold that the State could be deprived of its indisputable sovereign right of regulation merely by the form of decedent's investment. The right of testamentary disposition is purely a matter of grace on the part of the various states. (Mager vs. Grima, *supra; Knowlton vs. Moore, supra*, 55; and *Uterhart vs. United States*, 240 U. S., 598, 603; *Maxwell, et al. vs. Bugbee, et al.*, 250 U. S., 525). A state can absolutely prohibit a devise to the United States.—*U. S. vs. Fox*, 94 U. S., 315.

But that there is no analogy between the powers of the States and those of the Federal Government appears when it is considered the right of the United States Government to levy taxes of any nature is solely found in the Constitution which gives it the right to levy taxes, imposts and duties. The Federal Government has absolutely no power in the matter of the disposition of decedent's estates. Its right is to tax decedent's estates which right comes solely by virtue of the Constitutional provision and not by virtue of any right to regulate estates. *Knowlton vs. Moore*, 178 U. S., 41, 58; *Magoun vs. Savings Bank*, 170 U. S., 287, 288. It thus becomes apparent that there is a vital distinction between the rights of the various states in the matter of regulating decedent's estates and the right of taxation of the Federal Government. Where the power of regulation is involved, there is no question of lack of power to tax, but not so where the power of taxation is brought in play.

Mr. Justice Holmes, in his dissenting opinion in *Chanler vs. Kelsey*, 205 U. S., 466, page 480, said:

> "I have always believed that a state inheritance tax was an exercise of the power of regulating the devolution of property by inheritance or will upon the death of the owner,—a power which belongs to the states; and I have been fortified in my belief by the utterances of this Court from the time of Chief Justice Taney to the present day. * * * For that reason the power is more unlimited than the power of a state to tax transfers generally, or the power of the United States to

> levy an inheritance tax. The distinction between State and United States inheritance taxes was recognized in *Knowlton vs. Moore*, 178 U. S., 41, 58, and whatever may be thought of the decision in *Snyder vs. Bettman*, 190 U. S., 249, I do not understand it to import a denial of the distinction, reaffirmed by the dissenting members of the Court, 190 U. S., 256."

and further, (at page 482):

> "The ground upon which this tax is imposed is, I repeat, the right of the State to regulate or if it sees fit, to destroy inheritances. If it might not have appropriated the whole it cannot appropriate any part by the law before us."

In other words, the distinction between the State taxes, so-called, and the Federal tax, is that in the case of the States it is not a tax at all, but instead, is an assertion on the part of the States of their power to regulate testamentary disposition and successions, while in the case of the Federal Government the estate tax is a tax, pure and simple.

The act denominates it an "Estate Tax," and it is a tax. U. S. vs. Woodward, *supra.*

It is a pure Estate tax. *In re Hamlin*, 226 N. Y., 407; *Inman's Estate*, 199 Pac. Rep., 615. And where the taxing power is brought into play, municipal securities are beyond its reach. *Snyder vs. Bettman*, 190 U. S., 249.

It will surely not be contended by the Government that a tax upon the transfer of municipal securities

inter vivos lies within the power of the Federal Government, and it is respectfully submitted there is no valid distinction between a transfer *inter vivos* and a transfer upon death, for in both cases the occasion of the tax is the transfer of property.

It may be argued that the Estate Tax is not upon the property of the decedent, but upon the right to dispose of it. But this right of disposition is certainly an incident of the property. It is true it is not directly upon it, but nevertheless the property is indirectly taxed. If the tax is correctly designated as "indirect" it must be of its very essence that something is indirectly taxed thereby. In the case of the Estate Tax, this something indirectly taxed can be nothing other than the estate which is of course the assets of the decedent. To the extent that these assets consist of municipal bonds, these bonds, if they were permitted to be included in the assets on which the tax is computed, would necessarily be indirectly taxed, but the authorities make it clear that municipal bonds are not any more subject to indirect taxation by the Federal Government than they are to direct taxation by the same power. This Court, in *U. S. vs. Field,* 41 U. S. Sup. Ct. Rep., 256, speaks of the Estate Tax as a property tax and in New York Trust Co. vs. Eisner, *supra*, this Court says:

> "Conversely, if a tax on the property distributed by the laws of a State, * * *."

And in Knowlton vs. Moore, *supra*, in speaking of the English Estate duty, which is similar in every re-

spect to the Estate Tax, the Court says, at page 49 (quoting from Hanson):

> "The new duty imposed by the Finance Act, and called estate duty, as has been said above, superseded probate duty; but the key to the construction of the Finance Act lies in remembering that the new estate duty, although it is leviable on property which was left untouched by probate duty, such as real estate, yet is in substance of the same nature as the old probate duty.

At page 5: (Hanson, 4th Ed. 66-7)

> "* * * the scheme of the Act is to tax not the interest which has ceased, but the property out of which the interest was enjoyed."

VI.

It is, therefore, respectfully submitted that the action of the learned Court below in refusing to enter judgment for the plaintiff on the municipal bond item, is erroneous and should be reversed.

Respectfully submitted,

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Attorneys for Plaintiff-in-Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1921.

MARY LOUISE GREINER, EXECUTRIX under the last will and testament of Kate B. Kingsley, deceased, plaintiff in error,
v.
C. G. LEWELLYN, COLLECTOR OF INTERNAL REVENUE.
} No. 187.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR THE DEFENDANT IN ERROR.

STATEMENT OF FACTS.

The plaintiff in error, executrix of Kate B. Kingsley, brought this suit to recover money paid by her under protest as portions of an estate tax collected under the act of Congress of September 8, 1916 (39 Stat., chap. 463, pp. 756, 777), and the amendment of October 3, 1917 (40 Stat., chap. 63, pp. 300, 324).

She filed a return pursuant to the act of Congress and the instructions of the Commissioner of Internal

Revenue. At the same time, she protested against the inclusion in the return of—

(1) the value of certain bonds of political subdivisions of the State of Pennsylvania; and

(2) an item representing the amount of the collateral inheritance tax paid by her to that State;

asserting that these two items were not subject to taxation under the statute. Nevertheless, the collector assessed against her the sum of $40,417.34, which included a tax of $9,117.25 upon the transfer of the portion of decedent's estate represented by the first item, and a tax of $2,817.69 upon the transfer of the portion of the estate represented by the second item.

She paid the assessed tax under protest and filed a claim for refund of the amount paid under the protested items. Her claim was rejected. She thereupon brought this suit. The case was tried by the court upon an agreed statement of facts.

At the trial she contended that where the bonds of political subdivisions of a State are included in the net estate of a decedent, for the purpose of ascertaining and assessing the Federal estate tax, the result is a tax upon the bonds themselves and therefore a tax upon an instrumentality of the State government. The district court held that the tax was not upon the bonds, but upon the "transfer" thereof, because their value was included within the net estate as determined under the provisions of the

statute. Accordingly, it disallowed recovery of that item of the tax.

As to the second item, the court ruled that the assessment should not have included the amount paid as collateral inheritance tax to the State of Pennsylvania, and entered judgment for the plaintiff in error upon that item.

The plaintiff in error excepted to the action of the court. Her exceptions were overruled. She thereupon excepted to that ruling of the court and sued out this writ of error.

THE ESTATE TAX STATUTE.

The portions of the statute which bear upon the present case are as follows:

By section 201 "a tax * * * equal to the following percentage of the value of the net estate, to be determined as provided in section 203, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this act * * *" with percentages rising from 1 per centum of the amount of the net estate not in excess of $50,000 to 10 per centum of the amount in excess of $5,000,000.

Section 202 provides that the value of the gross estate includes the value of all property to the extent of the decedent's interest therein which "after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate."

By section 203 it is enacted that "for the purpose of the tax the value of the net estate shall be determined (a) in the case of a resident, by deducting from the value of the gross estate (1) such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages, losses incurred during the settlement of the estate arising from fires, storms, shipwreck, or other casualty, and from theft, when such losses are not compensated for by insurance or otherwise, support during the settlement of the estate of those dependent upon the decedent, and such other charges against the estate, as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered; and (2) an exemption of $50,000."

By section 205 the executor is to pay the tax. By section 208 it is provided that in case of collection from some person other than the executor, there shall be contribution from or marshalling of persons subject to equal or prior liability "it being the purpose and intent of this title that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution."

By section 900 of the act of 1917 the tax rate is increased.

THE QUESTION INVOLVED.

The sole question involved in this case is whether, when Congress imposes a tax upon the transfer of the net estate of a decedent, and that tax is based upon

the value of the net estate, there may be included in that value bonds of political subdivisions of a State.

It must be freely conceded that Congress could not impose a tax which fell *directly* upon those bonds or upon the income from them. But it does not follow that Congress may not lay a tax which bears upon them only incidentally and indirectly. (*Snyder* v. *Bettman*, 190 U. S. 249, 254.) On the contrary, this court has repeatedly sustained such Federal taxes and analogous State taxes which incidentally and indirectly affected Federal bonds.

The essential question, therefore, is whether the tax in issue is imposed upon the bonds themselves.

ARGUMENT.

I.

The statute taxes the transfer of property and not the property itself.

While the amount of the tax is based upon the value of the net estate transferred by the decedent's death, it is clear that the statute seeks to impose a tax upon the transfer of the property and not upon the property itself.

That such is the true nature of the tax—that the tax is in reality just what it purports to be—is shown by repeated decisions of this court in cases involving death duties, of which an estate tax is but a species. In each case the court has sustained the tax as one imposed upon the succession or devolution of property and not upon the property transferred.

Thus, in *Scholey* v. *Rew*, 23 Wall. 331, 348, the court held that an act of Congress which imposed a succession tax upon every devolution of title to real estate upon death was not a tax upon the land.

In *United States* v. *Perkins*, 163 U. S. 625, where a resident of New York bequeathed all of his estate to the United States, the court sustained a State law imposing a tax upon the transfer of property upon death, saying (pp. 628, 630) that:

> The tax is not upon the property, in the ordinary sense of the term, but upon the right to dispose of it, and it is not until it has yielded its contribution to the State that it becomes the property of the legatee. * * *
>
> The act in question is not open to the objection that it is an attempt to tax the property of the United States, since the tax is imposed upon the legacy before it reaches the hands of the Government. The legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax.

In *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 288, the above cases were cited with approval as sustaining the proposition that "an inheritance tax is not one on property, but one on the succession."

In *Knowlton* v. *Moore*, 178 U. S. 41, it was contended that a Federal tax upon the estate of a decedent before its transmission to the legatee was in effect an infringement of the right of the State to regulate the matter of descents and was for that

reason invalid. This court carefully considered the nature of death duties and sustained the tax.

> The thing forming the universal subject of taxation, upon which inheritance and legacy taxes rest, is the transmission or receipt, and not the right existing to regulate (p. 59).
>
> Taxes of this general character are universally deemed to relate, not to property *eo nomine*, but to its passage by will or by descent in cases of intestacy, as distinguished from taxes imposed on property, real or personal, as such, because of its ownership and possession. In other words, the public contribution which death duties exact is predicated on the passing of property as the result of death, as distinct from a tax on property disassociated from its transmission or receipt by will, or as the result of intestacy (p. 47).
>
> It is the power to transmit or the transmission or receipt of property by death which is the subject levied upon by all death duties (p. 57).
>
> All courts and all governments * * * conceive that the transmission of property occasioned by death, although differing from the tax on property as such, is, nevertheless, a usual subject of taxation (p. 58).

In *Plummer* v. *Coler*, 178 U. S. 115, a citizen of New York bequeathed certain United States bonds to a trustee for a daughter. The State sought to impose a succession tax upon this bequest and this was resisted on the ground that United States bonds, as

such, were not taxable. If the tax fell upon the property, it was clearly invalid. Referring to the Perkins case, this court said (p. 132):

> One of the propositions recognized in that case applicable to the present one is that a State tax that would be invalid if imposed directly on a legacy to the United States, may be valid if the amount of the tax is taken out of the legacy before it reaches the hands of the Government—the theory of such a view apparently being that the property rights of the Government do not attach until after the tax has been paid, or until the condition imposed by the tax law of the State has been complied with. Such is also the case in respect to the legacy to Ella Plummer Brown, as the statute in question distinctly makes it the duty of the executor to pay the amount of the tax before the legacy passes to the legatee.

And in *Snyder* v. *Bettman*, 190 U. S. 249, the last case which it is necessary to consider in this connection, the court upheld and applied a Federal succession tax, showing that the authority to levy such a tax does not arise solely from the power to regulate the descent of property, but, as well, from the independent general power to tax. It added (p. 254):

> Having determined, then, that Congress has the power to tax successions; that the States have the same power, and that such power extends to bequests to the United States, it would seem to follow logically that

> Congress has the same power to tax the transmission of property by legacy to States, or their municipalities, and that the exercise of that power in neither case conflicts with the proposition that neither the Federal nor the State government can tax the property or agencies of the other, since, as repeatedly held, the taxes imposed are not upon property, but upon the right to succeed to property.

This case was cited with approval in *South Carolina* v. *United States*, 199 U. S. 437, 458.

The estate tax involved in the case now before the court, it will be observed, is not imposed upon legacies or bequests but "upon the transfer of the net estate of every decedent dying after the passage" of the act. It is imposed on the transmission of property before it reaches the distributees. It is, at least as clearly as the taxes already referred to, laid upon the transfer of the estate and not upon the property to be distributed.

II.

Congress may, therefore, impose a tax based upon the value of the entire net estate, even though a portion of the estate consists of bonds of political subdivisions of a State.

Since a tax upon the transfer of an estate is not a tax upon the property itself, it is obvious that the nature of that property has no bearing upon the constitutionality of the estate tax.

The court so decided in *Plummer* v. *Coler*, 178 U. S. 115, when it sustained an inheritance tax

of New York, although applied to a bequest which consisted of United States bonds. *Murdock* v. *Ward*, 178 U. S. 139 (followed in *Sherman* v. *United States*, 178 U. S. 150, 151), and *Orr* v. *Gilman*, 183 U. S. 278, involved the same principle. In the former case the court decided that United States bonds included in a distributive share of the decedent's estate were not exempt from a Federal tax on the transmission of such property, although the statute under which the bonds were issued, and the bonds themselves, declared that the bonds were not subject to taxation. In the latter case the court declared (183 U. S. 289) that a State succession tax did not impair the obligation of a contract when imposed in cases where the property passing consisted of securities which were by contract exempt from taxation.

The principle that the nature of the property bequeathed is immaterial in determining the applicability of the estate tax is further supported by the decisions that the identity of the distributee is immaterial.

In *United States* v. *Perkins*, 163 U. S. 125, a State law under which a bequest to the United States was taxed was sustained; in *Snyder* v. *Bettman*, 190 U. S. 249, a Federal law under which a bequest to a municipality was taxed was held constitutional; and in *New York Trust Co.* v. *Eisner*, 256 U. S. —, 41 Sup. Ct. 506, this court decided last June that the estate tax statute, involved in the instant case, applied to that portion of the estate of a decedent

which was paid out as State inheritance and succession taxes, and enforced the provision.

Certainly, if a State may tax a bequest of United States bonds, there can be no rule of comity between the States and the Federal Government which precludes Congress from taxing the transfer of that portion of an estate which consists of the bonds of a State or its political subdivisions. And it seems clear that if the Federal Government may, under the instant law, tax the portion of the estate which is paid to a State itself in taxes, it may, without infringing upon the political powers of the State, tax the transfer of even that portion of the estate which is invested in the bonds of political subdivisions of the State.

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MARCH, 1922.

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